87-1658

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

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TROY ROGER CAGLE,

Appellant,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Appellee.

—o—

On Appeal From The Supreme Court Of Colorado

—o—

JURISDICTIONAL STATEMENT

—o—

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DATED: April 6, 1988

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QUESTION PRESENTED

Whether § 18-18-105 (1) (a), 8 Colorado Revised Statutes (1983 Supplement), is repugnant to the Constitution, because it violates the equal protection guarantees of the Fourteenth Amendment, particularly the Eighth Amendment's ban on inflicting cruel and unusual punishment, made applicable to the States by the Fourteenth Amendment.

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OPINION BELOW

The opinion of the Supreme Court of Colorado, which appears in the appendix hereto, page App. 1, *infra,* has not been reported officially as of this writing but has been reported in Brief Times Reporter, Volume XII, Issue 7, p. 200.

—o—

JURISDICTION

The judgment of the Supreme Court of Colorado holding that § 18-18-105(1)(a), 8 Colorado Revised Statutes (1983 Supplement) does not violate the equal protection guarantees of the Fourteenth Amendment to the Constitution was entered on February 8, 1988. See page App. 1, *infra*. Cagle's Petition For Rehearing was entertained and denied on March 7, 1988. See page App. 17, *infra*.

Cagle's Notice of Appeal to this Court was timely filed in the Supreme Court of Colorado on March 30, 1988. See page App. 18.

This appeal is being docketed in this Court within 90 days from the denial of the rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Eighth Amendment, United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

HOW THE FEDERAL QUESTION WAS RAISED

The equal protection guarantees of both the Colorado Constitution and the United States Constitution were first raised in the trial court, by Cagle's trial counsel, orally, prior to sentencing, when he argued that the statute in question is unconstitutional. The People contended that Cagle had not properly preserved the issue for review. The Colorado Supreme Court disagreed. *See* section III A of the Opinion Below, page App. 9.

Cagle argued that the statute violated the equal protection guarantees of the Fourteenth Amendment *and* of Article II, sections 6 and 25 of the Colorado Constitution in the Colorado Supreme Court. *See* selected pages of Cagle's Opening Brief, pp. App. 21-24.

The Colorado Supreme Court considered and expressly rejected Cagle's constitutional claims, federal and state. *See* section III B of the Opinion Below, page App. 10.

STATEMENT OF THE CASE

On October 13, 1983, twenty-year-old Troy Roger Cagle was arrested on the charge of Possession of a Schedule I controlled substance, to wit: psiloscybin mushrooms.

After an interlocutory appeal vacated the trial court's suppression of the evidence, the case proceeded to trial, and Cagle was convicted. He was sentenced to twelve years plus one year parole, and he appealed. One of the issues on appeal was whether the statute under which Cagle was charged is unconstitutional. The statute, § 18-18-105(1)(a), 8 C.R.S. (1983 Supplement), was attacked as violating the equal protection guarantees of both the State and Federal Constitutions. The Colorado Supreme Court held in favor of the statute's validity under both Constitutions. Thus, the federal question has emerged for this Court's appellate review: whether § 18-18-105(1)(a), 8 C.R.S. (1983 Supplement) is repugnant to the Constitution, because it violates the equal protection guarantees of the Fourteenth Amendment.

THE QUESTION IS SUBSTANTIAL

Importance

Drugs are a major, multifaceted problem in our society. The federal government, state governments, churches, employers, celebrities, parents, and drug users, themselves, are investing time, money and emotional energy to combat drugs. It is in the public's best interests to solve the drug problem immediately. Still, the statutes enacted to control drug use and drug trafficking are subject to constitutional limitations, just the same as any other statute. It is important that this Court grant plenary review of this case and reverse the Colorado Supreme Court so that victims of drugs and drug traffickers—those

who use drugs and, therefore, possess a small quantity of the drugs they use—are not further victimized by being punished as severely as the drug traffickers.

This Court has held as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. *Solem v. Helm*, 463 U.S. 277, 290 (1983). In Colorado, when this case arose, a class five felony was punishable by imprisonment for from six months to four years, depending on mitigation or aggravation, while a class three felony was punishable by imprisonment for from four to sixteen years. In Colorado, *use* of a schedule I controlled substance is a *class five felony*, while simple *possession* of a schedule I controlled substance is a *class three felony*, classed with the drug trafficking offenses, such as possession *with intent* to manufacture, dispense, sell, or distribute.

Cagle was convicted of *simple* possession of a small amount of psilocybin mushrooms, mushrooms which he intended to use himself. However, his intent as to the mushrooms was neither an element of the charge, nor a defense. He was *not* charged with possession *with intent to sell* or distribute. Cagle was charged with simple possession and no "intent" element needed to be proven; nor is simple possession seen as a lesser-included of *use* in Colorado, which it logically is, unless proven otherwise by other factors, such as the quantity possessed.

Cagle was convicted of simple possession of a schedule I controlled substance and, because he was on probation when charged, sentenced to twelve years in prison. Cagle has no quarrel with Colorado's punishing class three felonies more severely than class five felonies, nor does he

quarrel with the required sentencing in the aggravated range of probationers convicted of a felony. Cagle and the Constitution do have a quarrel, however, with Colorado's classifying simple possession as a class three felony along with the trafficking offenses, while classifying use as a class five felony.

Equal protection of the laws is guaranteed by the Fourteenth Amendment. Equal protection of the laws requires statutory classifications of crimes to be based on differences that are *real* in fact and reasonably related to the general purposes of criminal legislation. Different statutory provisions proscribing with different penalties what *ostensibly* might be different acts but offering no intelligent standard for distinguishing the proscribed conduct should violate equal protection.

The Colorado Supreme Court held that the vast difference in penalties between use and simple possession is justified, because the "proscription of possession, without more, facilitates the enforcement of the law against traffickers by eliminating the burden of proving a transfer." (*See* Opinion Below, page App. 12.) That may well be true. However, it also facilitates cruel punishment of *non-traffickers*. Simple possessors of a very small amount of a schedule I controlled substance are treated as harshly as big-time traffickers. The Colorado Supreme Court was mistaken to uphold the statute at issue and could only do so by indulging in judicial legislation, that is, creating a new inchoate crime: "Possession with the *possibility* of distribution." There is now no such crime as simple possession in Colorado.

The war on drugs must be waged, but it must be waged in a manner consistent with the Constitution. As it

stands, the Colorado statute in question encourages arbitrary and capricious punishment of drug users and provides for gross disparity in the treatment of persons similarly situated. The prosecutor now has unfettered discretion to choose who among the simple possessors of small quantities of drugs for their own use will be punished as harshly as drug traffickers and who will not. The Equal-Protection, Eighth Amendment proportionality inquiry requires case-by-case, totality-of-the-circumstances decision making that can only be accomplished with plenary review.

Conflicts

Enlightened jurisdictions, including the federal government, punish simple possession much less harshly than possession with intent to distribute. *And* the intent to distribute must be proven. *See* 21 U.S.C.A. § 844 (1987 Pocket Part), penalties for simple possession of a controlled substance, which provides for "imprisonment of not more than 1 year" for a first offense and "not less than *15 days* but *not more than 2 years*" if there is a prior conviction for any drug or narcotic offense. (Emphasis supplied.) Compare that with the much harsher penalties under 21 U.S.C.A. § 841 for the drug trafficking offenses.

Further, the Uniform Controlled Substances Act, 9 U.L.A. § 401(c), makes simple possession of a controlled substance a *misdemeanor*. The Commissioner's Note, 9 U.L.A. p. 259, reads in pertinent part:

> Subsection (c) has been drafted specifically to provide for a lesser penalty for simple possession than is provided for the trafficking offenses under subsections (a) and (b). It is contemplated that (a) and (b) will contain harsh penalties (felony, high misde-

meanor, etc.); subsection (c) provides for misdemeanor (or comparable state term) treatment for the simple possession charge.

Space and time limitations do not allow for a review of the individual state statutes here. However, in Colorado, the predecessor to the statute in question, the Colorado Narcotic Drugs Act, C.R.S. 1963, 48-5-1 to 48-5-21, punished simple possession less harshly than possession with intent to sell or distribute and punished use even less harshly than simple possession. Cagle argued below that the Colorado legislature committed a drafting error of constitutional magnitude when it replaced the old Narcotic Drugs Act with the current statute that includes simple possession in the same class with the trafficking offenses for punishment. The punishment Colorado imposes upon simple possessors of controlled substances is not proportionate to the offense and is in conflict with federal and uniform punishment schemes. Cagle does not know at this time how the other states treat simple possession, but he does know that he is facing 12 years in prison and that the number of persons presently incarcerated in Colorado for simple possession of a controlled substance is substantial. The Opinion Below should be reversed, but more importantly, Cagle's case presents a timely opportunity for this Court to set one of the national, constitutional rules of warfare in the war on drugs, to wit: victims of drug traffickers who simply possess drugs cannot be punished as harshly as the drug traffickers.

———o———

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal and that the question presented is so substantial as to require plenary consideration.

Respectfully submitted,

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DATED: April 6, 1988

SUPREME COURT, STATE OF COLORADO
NO. 86SA169 February 8, 1988

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

TROY ROGER CAGLE, Defendant-Appellant.

Appeal from District Court, Arapahoe County
Honorable Charles Friedman, Judge

EN BANC JUDGMENT AFFIRMED

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JUSTICE ERICKSON delivered the Opinion of the Court.

Defendant Troy Roger Cagle was charged with possession of a controlled substance in violation of section 18-18-105, 8 C.R.S. (1983 Supp.), and driving under denial in violation of section 42-2-130, 17 C.R.S. (1983 Supp.). The prosecution appealed a ruling of the Arapahoe County District Court suppressing the defendant's statement to police

officers and evidence seized from the defendant's automobile. After reviewing the interlocutory appeal, *People v. Cagle*, 688 P.2d 718 (Colo. 1984), we vacated the ruling of the district court and remanded for additional findings of fact. On remand, the district court conducted a second suppression hearing, and denied the motion to suppress after making additional findings of fact and conclusions of law. The defendant was tried by a jury and was convicted on both counts. He then appealed to the court of appeals asserting: (1) the district court erred in admitting the evidence found in defendant's car and in admitting the defendant's statements; (2) section 18-18-105, 8 C.R.S. (1983 Supp.) violates the equal protection clause of the United States and Colorado Constitution; (3) the trial court imposed an inappropriate sentence; (4) the jury was improperly instructed; and (5) Cagle was denied effective assistance of counsel. In accordance with section 13-4-110, 6 C.R.S. (1973), the defendant filed a motion requesting determination of jurisdiction, and transfer of the appeal to this court. Because the defendant is challenging the constitutionality of a statute, we accepted jurisdiction. We now affirm.

I.

On June 19, 1983, Greenwood Village Police Officer Patrick Cillo, on patrol in his police car, began following the defendant's automobile because he believed that its presence in the area was suspicious. After observing the defendant change lanes without signaling, Officer Cillo turned on his overhead lights to signal the defendant to stop. The officer then saw the defendant's passenger bend down in his seat and remain in that position until

just before the defendant turned a corner and pulled over. The defendant, who got out of his automobile and approached Officer Cillo, was unable to produce a driver's license and gave a false name.[1] The officer recognized the defendant and knew that he had falsely identified himself. Officer Cillo called for backup assistance and ordered the defendant's passenger out of the car. As the passenger opened the car door the officer noticed a bottle of scotch whiskey in the car. The officer testified that the defendant and his passenger were not twenty-one years of age or older.

The trial court found that after Officer Smith arrived, Officer Cillo checked under the passenger's seat in the defendant's car for weapons and discovered a shirt crammed under the seat. As he pulled the shirt out, a plastic bag containing mushrooms fell to the floor. After finding the mushrooms, Officer Cillo placed the defendant and the passenger under arrest. The officer then advised the defendant of his *Miranda* rights. After the *Miranda* warning was given, the defendant stated that the plastic bags contained hallucinogenic mushrooms.

After the defendant was charged with possession of psilocybin, a schedule I controlled substance, in violation of section 18-18-105, 8 C.R.S. (1983 Supp.), a motion was filed to suppress the evidence found in his car and his statement to Officer Cillo. The district court granted the motion, ruling that although the officer had probable cause to stop the defendant, he did not have a reasonable suspicion to search the defendant's car for a weapon, and held that the defendant's statement was the fruit of an illegal search.

In *People v. Cagle*, 688 P.2d 718 (Colo. 1984) (Cagle I), we stated that the validity of the stop and search of the defendant's car was governed by the standards enunciated in *People v. Tate*, 657 P.2d 955 (Colo. 1983) and *Michigan v. Long*, 463 U.S. 1032 (1983). Because we were not able to determine from the record whether the officer's purpose in entering the vehicle was to make a protective search, we remanded the case for resolution of the second element of the *Tate* test: whether the purpose of the search was reasonable. On remand, the trial court conducted a second suppression hearing and denied the defendant's motion to suppress. The trial that followed was concluded with a jury verdict of guilty on both counts. The defendant's motion for judgment of acquittal notwithstanding the verdict and motion for a new trial were both denied. The trial court then sentenced the defendant to twelve years plus one year parole on count one, and six months on count two, to be served concurrently.

After obtaining new counsel, defendant filed a motion for reconsideration of sentence. In May 1985, the trial court placed Cagle on probation for twelve years. Probation was later revoked and the sentence was reinstated.

II.

A.

Defendant contends that the trial court erred in admitting evidence relating to the psilocybin mushrooms that were found in his car. The standards for determining the validity of a stop and search were set forth in *People v. Tate*, 657 P.2d 955 (Colo. 1983):

> (1) there must be an articulable and specific basis in fact for suspecting that criminal activity has or is

> about to take place; (2) the purpose of the intrusion must be reasonable; and (3) the scope and character of the intrusion must be reasonably related to its purpose.

Id. at 958. In *Cagle I*, we applied *Michigan v. Long*, 463 U.S. 1032 (1983), and held that under the proper circumstances a weapons search accompanying an investigatory stop may be extended to the passenger compartment of an automobile.[2] In the context of automobile searches, we in effect added a fourth requirement, in *Cagle I*, to the three enumerated in *Tate*: there must be a reasonable belief based on specific and articulable facts which reasonably cause the officer to believe that the suspect is dangerous and may gain immediate control of weapons.[3]

In applying the *Tate* test on remand, the trial court found that there was an articulable and specific basis in fact for suspecting that criminal activity had occurred because Officer Cillo observed the defendant changing lanes without using his turn signal and suspected the defendant of possessing an alcoholic beverage while under the age of twenty-one. We agree that the first prong of the *Tate* test was satisfied.

With respect to the second and third prongs of the *Tate* test, in *Cagle I*, "[w]e disagree[d] with the district court's conclusion concerning the scope and character of the search but remand[ed] . . . for a determination as to the second requirement of *Tate*: whether the purpose of the *search* was reasonable." *Cagle I*, 688 P.2d at 721-22 (footnote omitted). Moreover, we disagreed with the district court's conclusion that the search of the defendant's vehicle violated the third prong of *Tate* in that there was

"no indication or even reasonable suspicion that there would have been a weapon in the car." *Id.* at 721. In support of our conclusion that the third prong of *Tate* was met, we stated:

> Assuming that it can be shown on remand that Officer Cillo's purpose in conducting the search was in fact to look for weapons, we believe that the scope and character of the search accorded with such a purpose. The passenger's furtive conduct in bending down in his seat after Officer Cillo turned on his overhead lights would have warranted a reasonable belief that the passenger had a weapon beneath his seat, thus justifying a weapons search in that area.

Id. at 723 (citation omitted).

On remand, the trial court made the following findings relating to the second and third requirements of *Tate*:

> [As the defendant pulled over,] the passenger in the car, who was later identified as Scott Suderman, made a furtive gesture of reaching below the seat or bending over as if to be secreting something.
>
> . . . .
>
> . . . Officer Cillo used his hand-operated radio and called for assistance. . . . Officer Cillo then kept Mr. Cagle and Mr. Suderman at the rear of the car until Officer Rick Smith arrived. . . .
>
> After Officer Smith arrived, . . . Cillo, remembering the gesture made by Mr. Suderman of reaching down after the overhead lights were turned on and being bent over for some period of time, and in order to protect his safety, then proceeded to search the Cagle automobile for any weapons.
>
> . . . .

> At this point at least two criminal activities had taken place. One was basically a quasi-criminal activity, the changing of lanes without indicating this intention; the other the possession of alcoholic beverages to [sic] someone under the age of 21.

The trial court's finding that Officer Cillo searched the automobile for weapons in order to protect himself, is a factual determination of the officer's actual purpose in making the search. We will not disturb a trial court's findings of fact where they are supported by the record. *Martinez v. Continental Enterprises*, 730 P.2d 308 (Colo. 1986).

According to *Cagle I*, the second area of inquiry is whether the purpose is reasonable. Officer Cillo called a backup to the scene in order to protect his personal safety, and waited for the backup to arrive before searching the car. At the time of the search, Officer Cillo informed Officer Smith of the passenger's suspicious movements, and testified at both suppression hearings that the purpose of his search was to find weapons.[4] Officer Smith conducted a pat down search of the defendant, while Officer Cillo searched the car. Under the circumstances, we conclude that the purpose of Officer Cillo's search was reasonable. Because the record supports the trial court's finding that Officer Cillo's purpose in conducting the search was in fact to look for weapons, we reiterate our conclusion in *Cagle I* that the third requirement was met because "the scope and character of the search accorded with such a purpose." *Cagle I*, 688 P.2d at 723.

With respect to the fourth requirement that the officer reasonably believes the suspect is dangerous and may

gain immediate control of weapons, Officer Cillo testified at the second suppression hearing that he called a backup because the defendant had given him a false name which led him to believe that something was amiss. Cillo testified that he then asked the passenger to get out of the car in case he had a weapon. Cillo then waited until his backup arrived before he searched the car. While it is true that based upon past experience, Officer Cillo was familiar with the defendant and had no reason to believe he was dangerous, this was not the case with Suderman, the passenger. Since it was Suderman who made the furtive gesture, it was reasonable for Cillo to believe that Suderman was dangerous and could gain immediate control of a weapon. Accordingly, we conclude that the search conducted by Officer Cillo satisfies the test enumerated in *Cagle I*.

B.

The defendant also argues that his statements to police officers following the search should be suppressed as fruit of the poisonous tree. We agree with the trial court's finding that the defendant was properly advised of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and that he freely and voluntarily waived those rights. Because the defendant's statements were voluntarily made without coercion, force, promise or threat on the part of Officer Cillo or any other police officer, we conclude that the statements are admissible as against the defendant.

III.

The defendant claims that section 18-18-105, 8 C.R.S. (1983 Supp.), prohibiting one from possessing a schedule I controlled substance, is unconstitutional because it carries a greater penalty than the statute involving felony use of a schedule I controlled substance, section 18-18-104, 8 C.R.S. (1983 Supp.).

A.

The prosecution maintains that the defendant failed to properly preserve the issue for review. We disagree. The defendant raised the issue of the constitutionality of section 18-18-105, 8 C.R.S. (1983 Supp.), on March 28, 1985, after oral argument on his written motion for judgment of acquittal or for new trial, but immediately preceding sentencing. Crim. P. 12(b) provides in part: "When a motion challenging the constitutionality of the statute upon which the charge is based or asserting lack of jurisdiction is made after the commencement of the trial, the court shall reserve its ruling until the conclusion of the trial." Here, the defendant made his motion challenging the constitutionality of section 18-18-105 after the trial but before sentencing. The trial court found that the "motions are deemed timely filed for all purposes." It is axiomatic that this court will not consider constitutional issues raised for the first time on appeal, *Colgan v. Department of Revenue*, 623 P.2d 871 (Colo. 1981), *Manka v. Mertin*, 200 Colo. 260, 614 P.2d 875 (1980), *cert. denied*, 450 U.S. 913 (1981). However, when an issue concerning the constitutionality of a statute under which the defendant has been convicted is raised prior to sentencing, we

will not deny the defendant the right to appeal. In our view, the defendant properly preserved his constitutional challenge of section 18-18-105.

B.

Equal protection of the laws is guaranteed by the fourteenth amendment to the United States Constitution and by the due process clause in article II, section 25 of the Colorado Constitution. *People v. Oliver,* 745 P.2d 222 (Colo. 1987). Equal protection of the laws requires that those who are similarly situated will be afforded similar treatment. *People v. Mozee,* 723 P.2d 117, 126 (Colo. 1986); *People v. Calvaresi,* 188 Colo. 277, 281, 534 P.2d 316, 318 (1975). "When two criminal statutes prescribe different penalties for identical conduct, a defendant convicted and sentenced under the harsher statute is denied equal protection of the laws." *Oliver,* 745 P.2d at 227 (quoting *Mozee,* 723 P.2d at 126). If, however, there are reasonable differences or distinctions between the statutes, equal protection is not offended. *People v. Westrum,* 624 P.2d 1302, 1303 (Colo. 1981).

The fact that criminal conduct may violate more than one statutory provision, does not render such legislation constitutionally infirm. *People v. Romero,* No. 85SA319, slip op. at 5 (Colo. Nov. 30, 1987); *People v. Taggart,* 621 P.2d 1375 (Colo. 1981). Equal protection of the laws, however, requires statutory classifications of crimes to be "based on differences that are real in fact and reasonably related to the general purposes of criminal legislation." *Romero,* slip op. at 5 (quoting *People v. Mumaugh,* 644 P.2d 299, 301 (Colo. 1981)).

Section 18-18-105(1)(a), 8 C.R.S. (1983 Supp.), provides:

> Except as authorized by part 3 of article 22 of title 12, C.R.S., it is unlawful for any person knowingly or intentionally to manufacture, dispense, sell, or distribute, with or without remuneration, *to possess* or to possess with intent to manufacture, dispense, sell, or distribute, with or without remuneration, a controlled substance; or to induce, attempt to induce, or conspire with one or more other persons to manufacture, dispense, sell, or distribute, with or without remuneration, or to possess with intent to manufacture, dispense, sell, or distribute with or without remuneration, a controlled substance.

(Emphasis added.) In the case of a schedule I controlled substance, violation of this statute is a class 3 felony. § 18-18-105(2)(a)(I). On the other hand, any person who *uses* a schedule I controlled substance commits a class 5 felony. § 18-18-104(1)(a), 8 C.R.S. (1983). The defendant argues that the possession of a controlled substance is indistinguishable from use of a controlled substance, but because possession is punished more severely than use, section 18-18-105 violates the equal protection clause. We disagree.

In determining whether there is a reasonable distinction which justifies imposing harsher sentences for possession of a schedule I controlled substance than for use, we must determine whether the statutory classification is based on differences that are in fact real. In construing a statute, words and phrases should be given effect according to their plain and obvious meaning. *People v. District Court,* 713 P.2d 918 (Colo. 1986). Possession of a controlled substance does not necessarily involve use. If

a person is holding a plastic bag containing a psilocybin mushroom, he possesses a schedule I controlled substance. He does not use it until he ingests the mushroom. To use the mushroom, he must first possess it.[5] Once he uses the mushroom, he no longer possesses it.[6] Use and possession are therefore not identical acts. "An individual may illegally possess narcotics without being an addict [user], and an individual may be addicted [a user] and subject to legal sanctions without being in possession of narcotics at the same point in time." *People v. McKenzie,* 169 Colo. 521, 529, 458 P.2d 232, 235 (1969) (quoting *Casias v. People,* 160 Colo. 152, 157, 415 P.2d 344, 346, *cert. denied,* 385 U.S. 979 (1966)).

The prosecution contends that penalizing possession more harshly than use is justified because so long as one has possession of a controlled substance, he has the capability to distribute or dispense it. We agree with the prosecution's contention. In *People v. McKenzie,* 169 Colo. 521, 458 P.2d 232 (1969), we upheld the General Assembly's disparate treatment of the use and possession of marijuana under the Colorado Narcotic Drug Act. There, we discussed the difficulty in enforcing laws and in proving illegal transfers of drugs, stating that "[t]he proscription of possession, without more, facilitates the enforcement of the law against traffickers by eliminating the burden of proving a transfer." *Id.* at 527, 458 P.2d at 234 (quoting *State v. Reed,* 34 N.J. 554, 170 A.2d 419 (1961)).[7] The same policy consideration justifies placing possession of a controlled substance in the same category as possession "with intent to manufacture, dispense, sell, or distribute." § 18-18-105(1)(a).

The legislative purpose of article 18 of title 18 is set forth in section 18-18-101, 8 C.R.S. (1983 Supp.): "The general assembly hereby finds, determines, and declares that the strict control of controlled substances in this state is necessary for the immediate and future preservation of the public peace, health, and safety." We are not convinced that the General Assembly's disparate treatment of use and possession is not reasonably related to the purpose of strictly controlling controlled substances. Once a person uses a controlled substance, he primarily threatens only his own health and well-being. One who possesses controlled substances poses a greater threat to the "preservation of public peace, health and safety," which justifies the state's exercising greater control over him by imposing a more severe sanction.

The defendant claims that when the statutes contained in article 18 are read and construed together, simple possession is indistinguishable from use. The defendant argues that section 18-18-106(3)(a)(II), which states that "[o]pen and public display, consumption, or use . . . shall be deemed possession," indicates that the legislature intended to treat use and possession synonymously throughout article 18. "In construing different statutory provisions addressing the same topic, this court must make every effort to give full effect to the legislative purpose of all such provisions." *Senior Corp. v. Board of Assessment Appeals*, 702 P.2d 732, 742 (Colo. 1985). In our view, the General Assembly reasonably determined that because controlled substances pose a greater danger to the public than marijuana, the possession and use of controlled substances should receive disparate treatment. Because the General Assembly may prescribe more severe penalties

for acts it perceives to have graver consequences, *Romero*, No. 85SA319, slip op. at 6 (Colo. Nov. 30, 1987), *People v. Mozee*, 723 P.2d 117 (Colo. 1986), we will not disturb the legislative classification in this case. In our view, section 18-18-105 does not violate equal protection of the laws.

The remaining issues raised by the defendant are without merit. Accordingly, the defendant's convictions are affirmed.

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[1] The defendant, Troy Roger Cagle, gave the officer the name of his older brother, Bennie Cagle.

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[2] In *Long*, the United States Supreme Court concluded:

> that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Long, 463 U.S. at 1049 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)) (footnote omitted).

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[3] The defendant claims that article II, section 7 of the Colorado Constitution, which is substantially similar to the fourth amendment of the United States Constitution, should not be limited by *Michigan v. Long*, 463 U.S. 1031 (1983). Accordingly, the defendant urges us to reject the *Long* doctrine. In *Cagle I*, however, we stated: "The validity of the stop and search of the passenger compartment in this case is thus governed by the standards enunciated in *Tate* and *Long*." 688 P.2d at 721. Because our adoption of *Long* is the law of the case, we reject the defendant's claim. *See People v. Roybal*, 672 P.2d 1003 (Colo. 1983).

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[4] Officer Cillo's testimony at both suppression hearings supports the view that the purpose of his search was to find weapons. At the first suppression hearing Officer Cillo's testimony included the following dialogue:

Q: What did it appear to you as a police officer that [the defendant] was doing?

A: To me it was either putting something under or taking something out of the seat.

Q: When you observed this what went through your mind as a trained police officer?

A: My personal safety was first in my mind.

Q: Why do you say that?

A: Due to the many occasions where . . . police officers [get] shot [or] killed, or just from [my] experience . . . .

Q: What went through your mind as far as what was being taken out or put under the seat of the car?

A: I thought it was probably some kind of weapon.

At the second suppression hearing, Officer Cillo again testified that he searched the defendant's vehicle in order to protect himself. Cillo's testimony was corroborated by that of Officer Smith who testified that he was present at the time of the search; that Cillo had told him about the suspecious movement of the passenger; and that he conducted a pat down of the defendant while Cillo was searching the car.

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[5] While it is possible for one to use a controlled substance without possessing it, e.g., when another person places a mushroom into the user's mouth, we do not think this rises to the level of a distinction that can be fairly considered "real in fact."

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[6] We noted in *People v. McKenzie*, 169 Colo. 521, 528, 458 P.2d 232, 235 (1969), that "the containment of a consumed narcotic within a person's blood or respiratory system is not constructive possession."

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[7] The defendant argues that *McKenzie* is distinguishable from this case because it interpreted the Colorado Narcotic

Drugs Act, C.R.S. 1963, 48-5-1 to 48-5-21 which was repealed and replaced in 1981 by sections 18-18-101 to 18-18-109, 8 C.R.S. (1981). *See* 1981 Colo. Sess. Laws 707. Under that statutory scheme unlawful use of marijuana constituted a misdemeanor; unlawful possession, a felony; and possession with the intent to induce or aid another to unlawfully use or possess, a felony with a more severe penalty. While the current statutory scheme treats possession with intent to manufacture, dispense, sell or distribute and possession identically, this does not detract from the distinction made in *McKenzie* between use and possession.

The defendant further argues that *McKenzie* is inapposite because *Blockburger v. United States,* 284 U.S. 299 (1932), upon which *McKenzie* was based, was rejected by this court. We disagree. We rely upon *McKenzie* because its distinction between use and possession satisfies our present equal protection test, as well as the test required by *Blockburger.*

SUPREME COURT, STATE OF COLORADO
Case No. 86SA169
Appeal from the District Court, Arapahoe County,
#83CR782

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

TROY ROGER CAGLE,

Defendant-Appellant.

Upon consideration of the Petition for Rehearing filed by The Appellant in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby, is, DENIED.

BY THE COURT. EN BANC. March 7, 1988.

cc: Clement Engle
Assistant Attorney General

(Seal)

Steven Janiszewski
Frank Martinez
Dixon and Snow
425 South Cherry St., Suite 1000
Denver, CO 80222

(Filed March 7, 1988)

SUPREME COURT, STATE OF COLORADO

No. 86-SA-169

APPEAL FROM DISTRICT COURT, ARAPAHOE COUNTY, NO. 83-CR-782

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

TROY ROGER CAGLE,

Defendant-Appellant.

(Filed March 30, 1988)

NOTICE IS HEREBY GIVEN that Troy Roger Cagle, the Defendant-Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Colorado, affirming the judgment of conviction, entered on March 7, 1988, when Cagle's Petition For Rehearing was denied.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Respectfully submitted,

DIXON AND SNOW, P.C.

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CERTIFICATE OF MAILING

I hereby certify that on the 30th day of March, 1988, a true and correct copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES was placed in the U.S. mails, postage prepaid, addressed to:

Attorney General's Office
1525 Sherman Street
Denver, CO 80203

Clerk of Arapahoe District Court
Arapahoe County Justice Center
7325 So. Potomac Street
Englewood, CO 80112

/s/ Doris Ann Lobmiller
DIXON AND SNOW, P.C.

COURT OF APPEALS
STATE OF COLORADO

Case No. 85-CA-0663

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

TROY ROGER CAGLE,

Defendant-Appellant.

APPELLANT'S OPENING BRIEF

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* * *

C. THE STATUTE UNDER WHICH CAGLE WAS CHARGED IS UNCONSTITUTIONAL.

1. C.R.S. 18-18-105 VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT AND OF ARTICLE II, SECTIONS 6 AND 25.

Equal protection of the laws requires that statutory classifications of crimes be based on differences that are real in fact and reasonably related to the general purposes of criminal legislation. *People v. Mumaugh*, 644 P.2d 299 at 301 (Colo. 1982), citing, *People v. Brown*, 632 P.2d 1025 (Colo. 1981); *People v. Marcy*, 628 P.2d 69 (Colo. 1981); *People v. Bramlett*, 194 Colo. 205, 573 P.2d 94 (1977), cert. denied, 435 U.S. 956, 98 S. Ct. 1590, 55 L.Ed. 2d 808 (1978); *People v. Czajkowski*, 193 Colo. 352, 568 P.2d 23 (1977); *People v. Calvaresi*, 188 Colo. 277, 534 P.2d 316 (1975). Different statutory provisions "proscribing with different penalties what ostensibly might be different acts, but offering no intelligent standard for distinguishing the proscribed conduct" violate equal protection. *People v. Marcy*, 628 P.2d at 75.

C.R.S. 18-18-105(1)(a), Addendum, p. 3, lists twenty different activities, which it categorizes as class three fel-

onies when a Schedule I or II controlled substance is involved. Of the twenty activities, all but one are variations on the theme of "manufacture, dispense, sell, or distribute." There is "knowingly and intentionally" to manufacture, dispense, sell, or distribute; there is "to possess with intent" to manufacture, dispense, sell, or distribute; there is "to induce, attempt to induce, or conspire with one or more other persons" to manufacture, dispense, sell, or distribute; there is even "to induce, attempt to induce, or conspire with one or more other persons to possess with intent" to manufacture, dispense, sell, or distribute. There is also, simply, "to possess." "To possess" is slipped into C.R.S. 18-18-105(1)(a) fairly early in the list at the number five position, making it appear as though simply "to possess" belongs there with those nineteen manufacturing, dispensing, selling, and distributing activities, but it does not belong there.

When the statutes contained in Article 18, Offenses Relating To Controlled Substances, Addendum, pp. 1-8, are read straight through and construed together, it is apparent that simply "to possess" is indistinguishable from "use," yet "use" of a Schedule I controlled substance is merely a class five felony (C.R.S. 18-18-104, Addendum, p. 2), while simply "to possess" a Schedule I controlled substance is ranked as a class three felony. C.R.S. 18-18-105 is, therefore, unconstitutional.

Cagle specifically directs this Court's attention to C.R.S. 18-18-106(3)(a)(II), Addendum, p. 4: "Open and public display, consumption, or use . . . shall be deemed possession . . . ."

To C.R.S. 18-18-106(5), Addendum, p. 5: "Transferring or dispensing not more than one ounce . . . . for

no consideration shall be deemed possession and not dispensing or sale thereof."

And to C.R.S. 18-18-106(b)(I), Addendum, p. 6, which lists the same "manufacture, dispense, sell, or distribute" crimes as C.R.S. 18-18-105(1)(a), applied to marijuana or marijuana concentrate, classifying these crimes as a class four felony—a much more severe penalty than the "use-possession" crimes. Simply "to possess" is not listed in C.R.S. 18-18-106(b)(I). Though the above comparisons are to the marijuana statute, there should be no confusion that Cagle is claiming that crimes involving Schedule I controlled substances should be penalized as lightly as crimes involving marijuana. Cagle is claiming only that, everywhere in Article 18, simple possession is treated as use, everywhere, that is, except in C.R.S. 18-18-105(1)(a).

Another, non-marijuana example, is appropriate here. C.R.S. 18-18-109, Addendum, p. 8, states: "A person to whom or for whom *use* of *any* controlled substance has been prescribed or dispensed by a practitioner may lawfully *possess* it . . . ." (emphasis added.) C.R.S. 18-18-109 is a legislative adoption of the notion that in order to *use* something one must possess it.

Nowhere in Article 18 is the difference between use and simple possession that justifies the vast difference in penalties defined. C.R.S. 18-18-105 is unconstitutional because it includes simply "to possess." The general legislative intent of Article 18 is to punish the "manufacture, dispense, sell, or distribute" crimes more severely than the "use" or simple "possession" crimes. C.R.S. 18-18-105 should be declared unconstitutional, and Cagle's conviction should be reversed.

* * *